

DATE: May 23, 1996  
CASE NO.: 95-INA-00022

In the Matter of:

AMERICAN WAY IMPORTING CORPORATION  
Employer

On Behalf of:

LUZVIMINDA SEROT ANONEUVO  
Alien

Appearance: Jack Golan, Esq.  
For the Employer

Before: Huddleston, Vittone, and Wood  
Administrative Law Judges

RICHARD E. HUDDLESTON  
Administrative Law Judge

#### DECISION AND ORDER

The above action arises upon the Employer's request for review pursuant to 20 C.F.R. § 656.26 (1991) of the United States Department of Labor Certifying Officer's ("CO") denial of a labor certification application. This application was submitted by the Employer on behalf of the above-named Alien pursuant to § 212(a)(14) of the Immigration and Nationality Act of 1990, 8 U.S.C. § 1182(a)(14) (1990) ("Act"). The certification of aliens for permanent employment is governed by § 212(a)(5)(A) of the Act, 8 U.S.C. § 1182(a)(5)(A), and Title 20, Part 656 of the Code of Federal Regulations ("C.F.R."). Unless otherwise noted, all regulations cited in this decision are in Title 20.

Under § 212(a)(14) of the Act, as amended, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that, at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work: (1) there are not sufficient workers in the United States who are able, willing, qualified, and available; and, (2) the employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

An employer who desires to employ an alien on a permanent basis must demonstrate that the requirements of 20 C.F.R. Part 656 have been met. These requirements include the responsibility of the employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means in order to make a good-faith test of U.S. worker availability.

We base our decision on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File,<sup>1</sup> and any written argument of the parties. 20 C.F.R. § 656.27(c).

### **Statement of the Case**

On June 28, 1993, the Employer filed an application for labor certification to enable the Alien to fill the position of Accountant at a monthly wage of \$3,095.00. The minimum experience required to perform this job was listed as four years in the job offered and the minimum education requirements were described as a B.S.B.A. in accounting (AF 28-29).

On February 15, 1994, the CO issued a Notice of Findings ("NOF"), in which he concluded that the application for labor certification was deficient for two reasons. First, the CO concluded that U.S. applicants were rejected because they failed to meet an undisclosed requirement which consisted of taking and passing an accounting test. Second, the CO concluded that the requirement to take this test is not an actual minimum requirement for the job because there is no evidence that the Alien was required to take the same test (AF 23-25). On March 21, 1994, the Employer submitted rebuttal to the CO's findings (AF 10-22). On April 8, 1994, the CO issued a Final Determination in which he concluded that the Employer had failed to rebut his findings of deficiency (AF 7-9). On May 2, 1994, the Employer requested review of that denial before an Administrative Law Judge (AF 1-3). On November 10, 1994, the Employer submitted a brief.

### **Discussion**

Section 656.21(b)(5) requires the employer to document that the requirements for the job opportunity are the minimum necessary for the performance of the job, and the employer has neither hired nor finds it feasible to hire workers with less training and/or experience or that it is not feasible to hire workers with less training or experience than that required by the job offer.

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<sup>1</sup> All further references to documents contained in the Appeal File will be noted as "AF *n*," where *n* represents the page number.

In the case at hand, the Employer has required a detailed test of applicants for the position for which labor certification is sought.

Without addressing the CO's first argument that such a test is inherently restrictive and assuming for the purpose of argument that it is an acceptable minimum requirement, it then follows that this minimum requirement must apply to the Alien as well as to the applicants. Where the alien does not meet an employer's stated job requirements, certification is properly denied under § 656.21(b)(6). *Marston & Marston, Inc.*, 90-INA-373 (Jan. 7, 1992). An employer's unsupported statement that the alien meets its minimum requirements does not constitute adequate documentation that the alien meets those requirements. *Wings Wildlife Production, Inc.*, 90-INA-69 (Apr. 23, 1991).

The CO stated in his NOF that there is no proof that at the time the Alien was hired for the position she had met the minimum requirement of having taken and passed an accounting test. He further stated that the Employer should furnish a copy of the test that was given to the Alien. In rebuttal, the Employer stated as follows:

I conducted an interview with [the Alien] on or about October 3, 1991 during which I asked her job related questions and tested in writing her ability to perform the duties of Accountant (as it was of no importance at the time, I did not both[er] to keep the papers of the test).

(AF 22).

We agree with the CO's contention that it is inconceivable that the Employer would discard any records from the hiring process related to the abilities of an employee (See, AF 9). As a result, the Employer's submission that it did, in fact, give a test to the Alien is unsupported and undocumented. Where an employer requires U.S. applicants to take a "company test" and an applicant is rejected in part for failing that test, the employer must document that the test was required of the alien. *Excel Limousine Corp.*, 93-INA-203 (May 24, 1994). Moreover, the Employer's rebuttal indicates an uncertainty even as to the date of the interview. He is unsure whether this extensive interview, resulting in the hiring of the Alien, took place on or about October 3<sup>rd</sup>. Because the Employer has failed to properly document that the Alien met the minimum requirement of passing an accounting test at the time she was hired, this requirement cannot constitute a minimum requirement under § 656.21(b)(6). Accordingly, if it is used as the basis to reject any applicants, then that rejection is unlawful.

In its brief, the Employer argues that it did not reject these three applicants solely for not

passing the test and that it had set forth other reasons for rejecting these three applicants in its recruitment report. In regard to applicant Martinez, the Employer stated in the recruitment report as follows:

Based on his resume, our conversation and his test, [he] has no experience in payroll, he has difficulties with defining balance sheets and in the preparation of income statement (please see his test). Therefore [he] does not qualify for the offered position.

(AF 47).

However, Mr. Martinez states in response to a follow-up questionnaire that he was never interviewed (AF 82). He states that he arrived at 2 p.m. for his interview and was given a 30-minute test. He states that he was supposed to be interviewed by the vice-president of the company, but left at 3:30 p.m. when the Employer did not make an appearance. Accordingly, this applicant's report contradicts the Employer's implication that the applicant was interviewed. Although the Employer indicates that the applicant's resume was also a factor, it gives no detail in regard to any proficiencies contained therein. With no explanation as to why this applicant's resume was a critical factor, the only remaining basis for rejecting this applicant was the test in question. Thus, we find the Employer's argument that the test was not a determining factor in the rejection of U.S. applicants to be unpersuasive. Moreover, the fact that the test was a factor at all, with no evidence that such a test was given to the Alien, constitutes a basis for denial. See *Excel Limousine Corp., supra*. The Employer has, therefore, rejected applicants for unlawful reasons.

### **ORDER**

The Certifying Officer's denial of labor certification is hereby **AFFIRMED**.

Entered this the August 22, 2002 for the Panel:

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Richard E. Huddleston  
Administrative Law Judge

**NOTICE OF PETITION FOR REVIEW:** This Decision and Order will become the final decision of the Secretary of Labor unless, within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except **(1)** when full Board consideration is necessary to secure or maintain uniformity of its decisions, or **(2)** when the proceeding involves a question of exceptional importance. Petitions for such review must be filed with:

*Chief Docket Clerk  
Office of Administrative Law Judges  
Board of Alien Labor Certification Appeals  
800 K Street, N.W., Suite 400  
Washington, D.C. 20001-8002.*

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of a petition the Board may order briefs.